Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	
Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996	CC Docket No. 96-187

OPPOSITION OF BELL ATLANTIC AND NYNEX TO PETITIONS FOR RECONSIDERATION

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I. Introduction And Summary

Bell Atlantic and NYNEX oppose the petitions filed by AT&T Corp. ("AT&T") and MCI Telecommunications Corp. ("MCI") for reconsideration of the Commission's Report and Order[3] implementing the tariff streamlining provisions of the Telecommunications Act of 1996. The Commission has already considered, and rejected, their arguments that the term "deemed lawful" in new Section 204(a)(3) of the Act creates only a rebuttable presumption that rates in streamlined tariffs are the lawful rates. Their request that the Commission

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[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.

[2] The NYNEX Telephone Companies are New York Telephone Company and New England Telephone and Telegraph Company.

[3] Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187, FCC 97-23, released January 31, 1997.

require pre-filing of tariff review plan data for mid-year exogenous cost changes should also be rejected, as it would further dilute the notice periods adopted by Congress for streamlined tariff filings. Finally, their proposals to weaken the rule for issuance of standard protective orders and to modify the filing period for oppositions to streamlined tariff filings would fail to protect confidential information and would make it extremely difficult for the Commission's staff to evaluate streamlined filings within the statutory notice period.[4]

II. The Commission Has Already Considered, And Rejected, The Petitioners' Arguments That The Term "Deemed Lawful" Should Create No More Than A Rebuttable Presumption Of Lawfulness.

The primary issue in the petitions for reconsideration is the Commission's interpretation of the term "deemed lawful" in new Section 204(a)(3) of the Act. In the Report and Order, the Commission correctly recognized that this term means that a streamlined tariff which takes effect prior to suspension and investigation "is conclusively presumed to be reasonable and, thus, a lawful

[4] Southwestern Bell Telephone Company ("SWBT") also filed a petition for reconsideration, arguing that the Commission unreasonably restricted the meaning of the term "deemed lawful," that the standard protective order for confidential information is insufficient, and that the Commission should not require the filing of tariff review plan data 90 days prior to the effective date of the annual access tariff filings. Bell Atlantic and NYNEX support SWBT's arguments and urge the Commission to amend its rules accordingly.

tariff during the period that the tariff remains in effect."[5] The petitioners argue that this term should be limited to only a rebuttable presumption of lawfulness.[6]

The Commission should dismiss these arguments. AT&T and MCI readily admit that these are the same arguments that they made, and that the Commission rejected, in the initial rulemaking proceeding.[7] The petitioners present nothing new that would warrant reconsideration of the Commission's well-reasoned decision.

The petitioners argue that "deemed lawful" is an ambiguous term that is susceptible to a range of meanings, and that the Commission should interpret it in light of the legislative history and context to mean that rates in a streamlined tariff that go into effect without suspension or investigation can be found later to be unlawful retroactively.[8] The Commission already considered this argument, and it recognized that the term "deemed" in this context is not ambiguous, citing several appellate decisions to this effect.[9] The petitioners attempt to distinguish these cases as only applying where another agency has made a previous ruling.[10] This is a distinction without a difference. The Courts in those cases made it

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[5] Report and Order, para. 19.

[6] *See* MCI Petition at pp. 1-14; AT&T Petition at pp. 1-10.

[7] *See* MCI Petition at pp. 2-4, 7; AT&T Petition at p. 2; *cf.* MCI letter to Secretary William F. Caton, dated December 16, 1996.

[8] *See id.*

[9] *See* Report and Order, para. 19.

[10] *See* AT&T Petition at pp. 4-5.

perfectly clear that the term "deemed" is not ambiguous, viewed either in isolation or in the context of the regulation or statute involved.[11]

AT&T tries to use Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968), a case cited by the Commission in the Report and Order, to argue that the courts have interpreted the word "deemed" as creating only a rebuttable presumption.[12] However, the language quoted by AT&T does not refer to the statutory term "deemed."[13] Rather, the Court was referring to the section of the statute which stated that "proof of the ownership of said motor vehicle shall be prima facie evidence that such person operated said motor vehicle with the consent of the owner." This provision clearly established only an evidentiary standard for the issue of consent. The rest of the statute provided that, once consent has been established, "the operator thereof shall in case of accident, be deemed to be the agent of the owner of such motor vehicle." The Court held that the term "deemed" created a "new substantive rule of law," not an evidentiary

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[11] *See* Municipal Resale Service Customers v. FERC, 43 F.3d 1046, 1053 (6th Cir. 1995); Ohio Power Company v. FERC, 954 F.2d 779, 783 (D.C. Cir. 1992); *see also* H.P. Coffee Co. v. Reconstruction Finance Corp., 215 F.2d 818, 822 (Emer. Ct. App. 1954) (finding near "unanimous judicial determination that the word deemed, when employed in statutory law, creates a conclusive presumption").

[12] *See* AT&T Petition at n.15.

[13] Similarly, other federal cases cited by AT&T as construing "deemed" to create a rebuttable presumption (*see id.* at n.16) rely on different statutory language. *See* Lavine v. Milne, 424 U.S. 577, 583 (1977) ("deemed" modified by the statutory provision "in the absence of evidence to the contrary supplied by such person"); Conoco, Inc. v. Skinner, 970 F.2d 1206, 1223-25 (3rd Cir. (1992) (corporation "deemed" a U.S. citizen only for purposes described in the statute); *Davis v. Califano*, 603 F.2d 618 (7th Cir. 1979) (appellant did not meet the statutory conditions to be a "deemed spouse").

presumption. Likewise, the term "deemed" in Section 204(a)(3) creates a new rule of law that a streamlined tariff is a lawful tariff.

MCI argues that the Report and Order created only a "time-limited presumption," because a streamlined tariff that is "deemed lawful" when it takes effect can be found unlawful at a subsequent time as a result of a Section 205 or 208 proceeding.[14] This leads MCI to conclude that the Commission has actually established a rebuttable presumption of reasonableness for streamlined tariffs. However, this does not appear to be the type of rebuttable presumption that MCI wants, as it does not apply retroactively. Since, in MCI's view, one type of rebuttable presumption is as good as another, MCI argues that the Commission should revise its interpretation of the term "deemed lawful" to allow a retroactive determination that a streamlined tariff is unlawful, so that a complainant could obtain damages.

This convoluted argument ignores the fact that the Commission has always had the ability under Section 205 to find that a previously lawful rate would be unlawful if charged in the future. As the Commission explained in the Report and Order, the streamlined tariff provisions now give the same effect to Section 208 proceedings, because streamlined tariff rates are the "lawful" rates until the Commission reaches a contrary conclusion.[15] Because Section 208 orders

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[14] *See* MCI Petition, pp. 4-5.

[15] *See* Report and Order, para. 21 ("a rate that is "deemed lawful" can also be reevaluated as to its future effect under Sections 205 and 208 and the Commission may prescribe a rate as to the future under Section 205").

can only have a prospective effect on streamlined tariff rates, the "deemed lawful" language creates a conclusive presumption of reasonableness, not a "time-limited rebuttable presumption."

The petitioners also repeat arguments made during the rulemaking proceeding that the Commission's interpretation of the term "deemed lawful" would change settled law and reduce the ability of carriers to challenge LEC rates.[16] However, the Commission found that this is the balance that Congress struck between consumers and carriers when it adopted the streamlined tariff provisions.[17] The Telecommunications Act of 1996 was designed to rely upon competition, rather than regulation, to provide telecommunications services at reasonable rates.[18] It is perfectly consistent with the deregulatory intent of the Act for Congress to provide that rates in a streamlined tariff filing are not subject to retroactive refunds unless the Commission initiates an investigation of the tariff prior to its effective date.

III. The Commission Should Not Require The Local Exchange Carriers To Pre-File Cost Support Information For Mid-Year Filings.

In the Report and Order, the Commission decided to require the LECs to file Tariff Review Plan ("TRP") data 90 days prior to the effective date of the annual access tariff filings, despite the fact that those filings may now be made

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[16] *See* MCI Petition at pp. 6-10; AT&T Petition at pp. 8-10.
[17] *See* Report and Order, para. 20.
[18] *See* S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., p. 113 (1996).

on 7 or 15 days' notice as streamlined tariff filings.[19] The Petitioners argue that the Commission also should require pre-filing of TRP-type data at least 30 days prior to the effective date of tariffs proposing mid-year exogenous cost changes.[20]

As Bell Atlantic and NYNEX demonstrated in their comments, advance filing of TRP data in connection with the annual access tariff filings is burdensome, it has limited usefulness, and it dilutes the intent of the tariff streamlining provisions of the Act.[21] The AT&T and MCI proposals would exacerbate these problems by requiring pre-filing of price cap index and cost support data for numerous tariff filings throughout the year. In allowing the LECs to file streamlined tariffs on 7 and 15 days' notice, Congress clearly intended to allow the LECs to implement tariff changes more quickly and to reduce the advance notice that they provide competitors about their intended rate changes. If the LECs were required to pre-file cost support for exogenous cost changes, their competitors would be able to anticipate major changes in LEC rates. This would reduce their incentive to offer competitive rates when negotiating with potential customers, and it would harm the ability of the LECs to compete on the basis of price.

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[19] *See* Report and Order, paras. 101-102.

[20] *See* MCI Petition at pp. 20-21; AT&T Petition at pp. 13-14.

[21] *See* Bell Atlantic Comments at pp. 4-5; NYNEX Comments at pp. 25-26; *see also* SWBT Petition at pp. 5-6.

Most price cap tariff filings are not complex. If the Commission has concerns about the cost support for mid-year exogenous cost changes, it can suspend and investigate such tariff filings within the statutory notice periods.

IV. The Commission Should Not Change Its Rule For The Use Of Standard Protective Orders.

MCI requests reconsideration of the Commission's finding that the LECs should be permitted to file cost support under confidential cover if they meet the requirements for confidential treatment under the Freedom of Information Act ("FOIA") or if they make a sufficient showing that the information should be subject to a protective order.[22] MCI argues that the Bureau will not have adequate time to determine if a LEC has met these standards, and that a LEC should not be allowed to request confidential treatment unless it has demonstrated that there is actual competition (which, in the case of a BOC, would require a showing that it has obtained approval to provide in-region interLATA services under Section 271(d)(3) of the Act).[23]

MCI's proposals should be rejected. The Commission properly recognized that the LECs will need to protect their confidential information in connection with streamlined tariff filings, and its decision to make this information available to interested parties under standard protective agreements

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[22] *See* Report and Order, para. 91. The Commission adopted a standard protective order for the use of the Common Carrier Bureau if it finds that a LEC has met the appropriate standards.

[23] *See* MCI Petition at pp. 15-18.

fairly balances the interests of all parties. MCI's argument that a LEC could not show competitive harm unless it has obtained interLATA authority is specious. Even before the Telecommunications Act of 1996 was passed, the Commission granted confidential treatment to certain LEC information that met FOIA requirements (as it must by law), such as trade secrets and confidential financial information. It is ludicrous to argue that the LECs do not possess any information that is privileged, confidential, or otherwise proprietary. MCI has not shown that compliance with protective orders will be burdensome. Therefore, the Commission should retain its rules for protection of confidential LEC information.

V. The Commission Should Retain Its Filing Periods For Streamlined Tariff Filings.

In the Report and Order, the Commission required petitions opposing LEC streamlined tariffs that are effective in 7 days to be filed no later than 3 calendar days from the date the tariff is filed, with replies to be filed within 2 calendar days of service of the petition.[24] AT&T argues that this will not allow sufficient time for preparation of oppositions, because the LECs will "predictably" file just before the close of business on Fridays. Therefore, it proposes that the rule be changed to allow oppositions to be filed within two business days of the tariff filing.[25]

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[24] *See* Report and Order, para. 78.

[25] *See* AT&T Petition at p. 11.

This proposal should be rejected. In the case of a filing made on a Friday, this would allow the opposition to be filed on the following Tuesday, with the LEC reply due the following Thursday, the day before the tariff's effective date. This would leave the Commission's staff with almost no time to consider the LEC's reply before deciding whether to suspend and investigate the tariff. AT&T's argument that the LECs will routinely file tariffs just before the close of business on Friday's is speculative. The Commission should gain some experience with the administration of streamlined tariff filings before deciding whether a problem exists.

VI. Conclusion.

For the foregoing reasons, the Commission should dismiss the petitions of AT&T and MCI for reconsideration of the Report and Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of this pleading were mailed this date, first class postage prepaid, upon the persons listed on the attached service list.

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Dated: April 10, 1997

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